RECORD AND BRIEFS

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No. 16-980

In the
Supreme Court of the United States

JON HUSTED, Ohio Secretary of State,
Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR VOTEVETS ACTION FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Deborah N. Archer
NEW YORK UNIVERSITY SCHOOL OF LAW
CIVIL RIGHTS CLINIC
245 Sullivan Street
New York, NY 10012
(212) 998-6528
Deborah.Archer@nyu.edu

Aderson B. Francois
Counsel of Record
INSTITUTE FOR PUBLIC REPRESENTATION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535
Abf48@law.georgetown.edu

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INTEREST OF *AMICUS CURIAE*[1]

VoteVets Action Fund is a nonpartisan nonprofit social welfare organization that advocates on behalf of veterans and their families. Registration and voter advocacy work are integral to VoteVets's mission. VoteVets believes veterans have a unique stake in today's social, economic, and political issues and is committed to amplifying veterans' voices on those issues. Veterans' ability to exercise the right to vote is critical to making their voices heard on these pivotal issues.

SUMMARY OF ARGUMENT

The right to vote and the practical ability to exercise that right are essential to a functional, responsive democracy. Active duty servicemembers and veterans have made significant and unique sacrifices to protect American democracy. Quite often, however, these servicemembers are effectively prevented from exercising the very rights they risk their lives to protect.

Active duty servicemembers and veterans experience uniquely personal consequences from elections. Policy changes affect military salaries and benefits, which then impact the quality and

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than *amicus curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

accessibility of healthcare, higher education, housing and post-service employment, as well as other essential benefits for servicemembers and their families. Yet, for all of the sacrifices they make, active duty servicemembers and veterans register to vote and exercise the right to vote for the elected representatives who implement these policies at disproportionately low rates.

The transient nature of the military lifestyle severely complicates servicemembers' ability to participate in this most basic political process. Active duty servicemembers, including those serving in the National Guard or the Reserves, depend on the military postal system. This system uses military-specific addresses tied to commands or units to send and receive important mail. However, servicemembers' mail is not automatically forwarded from their home addresses. Servicemembers must take the affirmative step of providing these military addresses to any organization from which they expect to receive mail. Even when not deployed to remote areas lacking reliable access to mail, servicemembers may have to travel more frequently – often with little to no notice – and must contend with early deadlines for registration and absentee voting. Although there is federal law meant to provide assistance to absent voters, the law does not ameliorate all of the logistical and residency-based difficulties those voters confront when voting from outside of their districts

Veterans confront further barriers to remaining on voter rolls and exercising the right to vote, including disproportionately high rates of mental health issues such as post-traumatic stress disorder, substance abuse, poverty, and

homelessness. These factors act to further depress the turnout of a population that already experiences unique barriers to accessing the polls.

Ohio's Supplemental Process, operating in conjunction with the obstacles already impeding voters' access to the franchise, creates a near-impenetrable barrier to voting for active duty servicemembers and veterans. By allowing failure to vote for only two years to trigger a Confirmation Notice, the Supplemental Process does not distinguish between lack of voting activity due to ineligibility and lack of voting activity despite continued eligibility – such as missing an election while on deployment. The Supplemental Process disparately obstructs active duty servicemember and veteran voters with mobile lifestyles. Ohio's use of a trigger as broad as the failure to vote to initiate Confirmation Notices will result in the erroneous removal and disenfranchisement of eligible military and veteran voters.

As the text of the National Voter Registration Act ("NVRA") and the Help America Vote Act ("HAVA") make clear, Congress intended to increase engagement in the democratic process. While the laws authorize states to establish mechanisms for maintaining voter rolls, these mechanisms are subject to a strict prohibition on the removal of registrants for merely failing to vote. The legislative histories of the NVRA and HAVA confirm the government's duty to protect the fundamental right to vote from discriminatory voter roll maintenance processes.

ARGUMENT

I. Protecting the Right to Vote is Essential to a Vibrant and Thriving Democracy.

The right to vote "is a fundamental matter in a free and democratic society." *Reynolds v. Sims*, 377 U.S. 533 (1964). This Court has time and again made clear that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[2] The founders of the Republic held a deep, though albeit selective, concern for the protection of meaningful political participation by members of the national family. James Madison held the view that "ordinary citizens lacked the competence to participate directly in their government. Public participation was best limited to electing a governing elite and holding those elected officials accountable in future elections." *See* Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS L. REV. 65, 118 (2012). But, in our continuing search for a more perfect union, we have inexorably expanded the franchise to more and more of our citizens, and, whether it be African-

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[2] *Reynolds*, 377 U.S. at 561-62; *see Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (holding even the most basic rights become illusory once the right to vote has been undermined); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (holding the fundamental constitutional significance of the right to vote is self-evident); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (holding citizens' "fundamental political right to vote" provides a counter against a State's compelling interests for regulating its elections).

Americans, women, or young people, we have removed impediments that stand in the way of meaningful political participation. This is the promise of American democracy.

A. Broad Civic Participation Honors American Ideals and Strengthens the Democratic Process.

The vitality of American democracy depends on all eligible voters participating in the democratic process.[3] The United States was founded on the principles of representative democracy: all Americans should have an equal voice in their government by electing the representatives of their choice.[4] While civic participation at the ballot box was initially limited to white, male property owners,[5] Americans from all walks of life have made incredible strides to redefine the boundaries of the franchise. At historic moments, elected leaders have heard the calls of citizens to enshrine equal voting rights in the law. In response, Congress amended the Constitution to preclude discrimination by race, U.S. CONST. amend. XV, sex, U.S. CONST. amend. XIX, and age, U.S. CONST. amend. XXVI, and created new statutory authority to promote an inclusive democracy through

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[3] *See Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (holding statutes that grant the franchise to some citizens but deny it to others must show such denials are "necessary to promote a compelling state interest," prioritizing the democratic value of expanding the right to vote rather than limiting it).

[4] *See, e.g.*, *The Federalist No. 10* (James Madison).

[5] *See* Alexander Keyssar, *The Right to Vote: The Contested History of the United States* xxiii (2009).

efficient and equitable access to registration and voting.[6]

Despite the transformative impact of the Voting Rights Act, the NVRA, and HAVA, obstacles to political participation persist. Voter purge programs like Ohio's Supplemental Process lead to widespread disenfranchisement of some of America's most vulnerable citizens. Increasing voter access and participation should be a guiding principle for America's courts and legislative bodies. Ohio has chosen to take a step back in the march toward a robust democracy instead of embracing a principle of inclusion.

When policies impose barriers to the ballot box, the consequences extend beyond election day. Groups that are excluded from voting become systematically underrepresented in policy decision-making.[7] Robust, inclusive voting access produces more effective policy outcomes.[8] In short, voting matters. Equal

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[6] *See, e.g.*, Voting Rights Act of 1965, 52 U.S.C. §§ 10301 *et seq.* (2012) (stating that no law may deny or abridge the right to vote on account of race); National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511 (2012) (enacted to increase registration, enhance participation, and protect the integrity of elections); Help America Vote Act of 2002, 52 U.S.C. §§ 20901–21145 (2012) (directing federal funds to states in order to improve the administration of elections).

[7] *See, e.g.*, John D. Griffin and Brian Newman, *Are Voters Better Represented?*, 67 J.Pol. 1206, 1222 (2005).

[8] *See, e.g.*, William Walter Franko, *The Policy Consequences of Unequal Participation*, 68 (July 2012) (unpublished Ph.D. dissertation, The University of Iowa) (on file with The University of Iowa Libraries) (finding that "[w]ho participates in American politics has consequences for the political process" and that participation "is shown to have a substantial influence on public policy in the states . . . not only

representation requires equal access to the ballot. The process of democratic elections must reflect the promise of democratic ideals.

B. Congress Conferred Jurisdiction to this Court to Enforce the NVRA and HAVA's Protections for Servicemembers' Voting Rights.

Congress enacted the NVRA with the clear purpose to establish procedures that would increase voter registration, "make it possible for Federal, State, and local governments to . . . enhance[] the participation of eligible citizens as voters in elections for Federal office," "protect the integrity of the electoral process," and "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501. The legislative history of the NVRA demonstrates that Congress is committed to protecting voting rights for eligible individuals. Congress understood that "to vote is a fundamental right" and that the government's duty is "to promote the exercise of that right." H.R. Rep. No. 103-66, at 1 (1993) (Conf. Rep.). Furthermore, Congress noted that "discriminatory and unfair registration laws and

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when looking at the policies adopted in the states, but also when considering the types of issues that are debated among state lawmakers"); Kim Quaile Hill & Jan E. Leighley, *The Policy Consequences of Class Bias in State Electorates*, 36 AM. J. OF POL. SCI. 351, 363 (1992) ("Thus, beyond strictly normative concerns about the character of democracy in the United States, we have provided persuasive evidence that participation is critical in the formulation of social welfare policies and that the composition of the electorate determines, at least in part, the nature of such policy.").

procedures can have a direct and damaging effect on voter participation of various groups." *Id.*

Congress's commitment to protecting voting rights for all Americans is particularly clear in its declaration that states cannot remove voters from their rolls due to an eligible voter's failure to vote. 52 U.S.C. § 20507(b)(2). The Congressional record further explains that the NVRA was specifically intended to eliminate the practice of using failure to vote as a basis for purging voter rolls. The Senate Report states that "[o]ne of the purposes of this bill is to ensure that once a citizen is registered to vote, he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction." S. Rep. No. 103-6, at 17 (1993).

Congress passed HAVA following the 2000 presidential election to amend the NVRA provisions regarding voter roll maintenance. There is no evidence that Congress intended for the 2002 amendments to weaken protections for individuals who cannot vote.[9] As with the NVRA, the legislative history of HAVA reveals that Congress intended to protect the rights of both eligible voters who abstain

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[9] *See* H.R. Rep. No. 107-730, at 81 (2002) (Conf. Rep.) ("The minimum standard requires that removal of those deemed ineligible must be done in a manner consistent with the National Voter Registration Act (NVRA). The procedures established by NVRA that guard against removal of eligible registrants remain in effect under this Act. Accordingly, H.R. 3295 leaves NVRA intact, and does not undermine it in any way."); *see also id.* (specifying that HAVA has "[n]o effect on other laws" and stipulating "that nothing in the Act...authorizes or requires conduct prohibited by the...National Voter Registration Act of 1993...or may be construed to supersede, restrict, or limit" the NVRA).

from exercising their right to vote and those who face obstacles in exercising that right. For example, in describing computerized list maintenance and the need for states to have systems in place to ensure voter registration records are accurate and updated regularly, the law prescribes that states must have:

> A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993...registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, *except that no registrant may be removed solely by reason of a failure to vote.*

H.R. Rep. No. 107-730, at 45 (2002) (Conf. Rep.) (emphasis added).

HAVA also includes specific provisions to ensure active duty servicemembers are able to vote. Congress took measures to ensure that "[t]he bill contains a number of the key provisions . . . which will help remove existing obstacles to absentee voting now confronting members of our armed services and overseas voters." H.R. Rep. No. 107-329, at 42 (2001). Furthermore, the text of the statute directs the U.S. Election Assistance Commission to "conduct a study on the best practices for facilitating voting by absent

uniformed service voters." 52 U.S.C. § 20982. The legislative history of HAVA further confirms Congress's commitment to protecting servicemembers' right to vote:

> Those who serve in our military, and citizens living abroad, face peculiar hardships when attempting to vote. Relatively simple things like applying for and transmitting ballots can become a very difficult and lengthy process for these voters. Steps must be taken to protect the rights of these citizens. Military voters risk their very lives in defense of this country. We must repay them by doing everything possible to see that they are able to vote and have their votes counted.

H.R. Rep. No. 107-329(I), at 41.

In the process of enacting HAVA, Congress understood that active duty servicemembers face unique challenges in exercising their right to vote. *See id.* In accordance with this clear legislative intent, states must create safeguards to ensure that active duty servicemembers have the opportunity to vote and that those votes are counted.

II. Despite Federal Efforts to Increase Participation, Registration and Voting Rates for Active Duty Servicemembers and Military-Connected Students are Alarmingly Low.

As Americans willing to make extraordinary sacrifices for their country, military servicemembers should enjoy unhindered access to voting. Active duty servicemembers and veterans have a unique, personal stake in U.S. policy. Federal spending dictates military salaries and benefits, determining servicemembers' access to health care, higher education, housing, post-service employment, and other benefits for servicemembers and their families.[10] Voting is the primary way by which military members can influence the leadership they serve. And yet, for all of their sacrifices, active duty servicemembers and veterans face significant hurdles when registering to vote, receiving ballots, and casting those ballots.[11]

While guaranteeing the vote for current and former servicemembers is not a new challenge, it is

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[10] *See* U.S. Dep't of Veterans Affairs, *Federal Benefits for Veterans, Dependents and Survivors* (2016); *see also* V. O. Key, Jr., *Southern Politics in State and Nation*, 527 (1949). ("The blunt truth is that politicians and officials are under no compulsion to pay much heed to classes and groups of citizens that do not vote.").

[11] *See, e.g.*, Adam Skaggs, *Registering Military and Overseas Citizens to Vote*, BRENNAN CENTER FOR JUSTICE 13, n. 18 (2009) (describing the challenges faced by military and overseas voters as well as the roadblocks caused by inaccurate voter registration information).

one that demands the country's continued attention.[12] Barriers to the ballot, such as Ohio's Supplemental Process, uniquely bar military servicemembers from participating in the democratic process. Existing federal measures provide insufficient voting assistance to active duty servicemembers and veterans.

A. Voter Participation Among Active Duty Servicemembers is Already Lower than Civilian Participation and Trending Lower.

Evidence indicates that active duty servicemembers both register and vote at lower rates than the citizen voting age population.[13] Alarmingly, registration and voting rates for active duty servicemembers have trended downward while those same rates have remained largely the same for citizens of voting age.[14]

Between the 2012 and 2016 elections, the voter registration rate for active duty servicemembers plummeted from 81% to 68% even as the rate for

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[12] *See* Donald S. Inbody, *Should soldiers' votes get counted? That's not as easy as you'd think*, WASH. POST (Nov. 11, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/11/11/ensuring-soldiers-a-chance-to-vote-was-a-challenge-in-the-civil-war-it-still-is-today/?utm_term=.12228df7502c ("For most of U.S. history, military personnel have not been able to vote.").

[13] Skaggs, *supra* note 11, at 1.

[14] Nancy Montgomery, *Troops Turned Out in Smaller Numbers for 2016 Presidential Vote*, STARS AND STRIPES (Aug. 22, 2017), http://www.military.com/daily-news/2017/08/22/troops-turned-out-smaller-numbers-2016-presidential-vote.html.

voting age citizens remained steady at 84%.[15] Additionally, the actual voting rate for active duty servicemembers fell from 59% during the 2012 election to just 46% in 2016.[16] At the same time, the voting rate for voting age civilians increased from 74% in 2012 to 75% in 2016.[17]

Such statistical disparities indicate that active duty servicemembers face unique obstacles compared to voting age citizens in exercising their right to vote. Active duty servicemembers acknowledge these obstacles through their own attitudes about the voting process. For example, the Federal Voting Assistance Program's 2014 post-election survey indicates that 67% of active duty servicemembers were not confident that their ballots were even counted.[18]

B. Federal Law Meant to Assist Absent Servicemembers in Voting Neither Alleviates nor Remedies All the Difficulties Such Voters Face.

The disparity between active duty servicemember and civilian voter turnout continues despite Congress's efforts to alleviate existing barriers active duty servicemembers face when attempting to vote. Since 1986, the Uniformed and

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[15] U.S. Dep't of Defense, Federal Voting Assistance Program, 2016 Post-Election Report to Congress, at 9 (2017).

[16] *Id.* at 10

[17] *Id.*

[18] *2014 Post-Election Voting Survey of the Active Duty Military Tabulations of Responses*, DEF. RESEARCH SURVEY AND STATISTICS CTR. 114 (2015) (produced at the request of the Federal Voting Assistance Program).

Overseas Citizens Absentee Voting Act ("UOCAVA") has provided certain servicemember voters with additional assistance in voting during federal elections. 52 U.S.C §§ 20301 – 20311 (Supp. III 2012).[19] In 2009, the UOCAVA was amended by the Uniformed Military Overseas Voters Act, which expanded the practical assistance the UOCAVA provides to covered voters. *Id.*

The UOCAVA covers (1) absent uniformed service voters and (2) overseas voters. The statute defines an "absent uniformed service member" as "a member of a uniformed service [20] *on active duty* who, *by reason of such active duty*, is absent from the place of residence where the member is otherwise qualified to vote." 52 U.S.C. § 20310(1)(A) (emphasis added).

The UOCAVA enables active duty voters to partake in various voter assistance programs. For example, the UOCAVA requires states to accept a Federal Post Card Application for absent active duty voters' registration and absentee ballot applications, 52 U.S.C. § 20302(a)(4), send absentee ballots to absent active duty voters through mail or email, 52 U.S.C. § 20302(a)(6)(c) , and allow absent active duty voters to submit a Federal Write-In Absentee Ballot if their absentee ballots fail to timely arrive, 52 U.S.C. § 20302(a)(3). The UOCAVA's provisions, however, do

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[19] Ohio adopted the UOCAVA program requirements in its state constitution. Ohio Rev. Code Ann. §§ 3511.01–3511.16 (West 2011) (ordering that UOCAVA be incorporated into the constitution).

[20] "Uniformed service" refers to the Army, Navy, Air Force, Marine Corps, and Coast Guard, the commissioned corps of Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration. 52 U.S.C. § 20310(7).

not entirely eliminate barriers to voter access for active duty servicemembers.

C. The UOCAVA is Not Designed to Circumvent Residency-Based Requirements Imposed by Ohio's Supplemental Process.

The UOCAVA applies to active duty voters who are "absent from the place of residence where the [uniformed service] member is *otherwise qualified to vote*." 52 U.S.C. § 20310(1)(A) (emphasis added). In other words, an active duty servicemember must be eligible to vote under Ohio's voter eligibility rules to submit a UOCAVA ballot, regardless of his or her out-of-state location at the time of the election. Therefore, the UOCAVA does not alleviate all the voting barriers imposed by the Supplemental Process.

Depending on an individual servicemember's assignment, it is reasonable to expect he or she might be away from their Ohio residence for more than the two years necessary to trigger the Confirmation Notice. However, the fact that these active duty voters are absent from their Ohio residences makes it less likely they will receive the Confirmation Notice, which they must respond to in order to remain on Ohio's voter rolls. At the very least, Ohio imposes an additional burden on the active duty voter, or on his or her family, by requiring that news of the Confirmation Notice is somehow forwarded to the active duty servicemember. Otherwise, the active duty voter serving his or her country far from home will remain ignorant of the Notice that prompted the process of his or her removal from the voter rolls.

1. The Decrease in the National Rate of Return and the Number of Absentee UOCAVA Ballots Indicate that the UOCAVA's Voter Assistance Programs Do Not Address All Barriers to Military Servicemembers' Voting.

Although the UOCAVA requires states to extend accommodations to active duty servicemembers, these accommodations cannot ensure absent ballots will be counted. The Ohio Secretary of State was dissatisfied with Ohio's 80.8% return rate for active duty and overseas voters' absentee ballots in the 2008 election because it suggested "a large number of Ohio UOCAVA citizens are not participating in the electoral process [] and those who are attempting to participate are experiencing an unacceptably high non-return rate."[21] However, in the 2016 election, only 68.1% of UOCAVA ballots were counted nationally.[22] Although the total number of UOCAVA ballots submitted, but not necessarily counted, was similar in the 2012 and 2016 federal elections, the number of UOCAVA

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[21] Office of the Ohio Secretary of State, *Bridging the Gap: Simplifying the process for UOCAVA voters through innovative technology and data collection* 3 (2013), https://www.fvap.gov/uploads/FVAP/Grants/Ohio_application.pdf (produced at the request of the Federal Voting Assistance Program).

[22] U.S. Election Assistance Comm'n, *The Election Administration and Voting Survey 2016 Comprehensive Report: A Report to the 115th Congress* 11-12 (2016), https://www.eac.gov/assets/1/6/2016_EAVS_Comprehensive_Report.pdf.

ballots submitted by uniformed service members decreased by approximately 84,000 ballots in the 2016 election.[23] The number of UOCAVA ballots submitted by overseas civilians, however, increased by approximately 90,000 ballots.[24]

The decrease in the total number of UOCAVA ballots counted nationally, as well as the decrease in the number of absent active duty voters submitting ballots, indicates that the UOCAVA's methods of assistance do not overcome other barriers to voting.

2. The Logistical Difficulties of Receiving and Submitting UOCAVA Ballots Negate the Assistance the UOCAVA Provides to Active Duty Voters.

The nature of active duty voters serving away from their Ohio residences complicates their ability to comply with the UOCAVA's logistical requirements. Although the UOCAVA requires states to send materials through a voter's preferred method, 52 U.S.C. § 20302(a)(6)(C), an active duty voter must have access to mail or Internet to request and receive a ballot. Further, regardless of the method through which the states send the absentee ballot, the active

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[23] *Id.*

[24] *Id.*

duty voter must mail a hard copy of the ballot back to Ohio.[25]

If an active duty voter is serving somewhere remote without reliable access to the Internet, printers, or local mail, it is functionally impossible for him or her to submit a ballot for counting. For active duty voters with more consistent access to mail and the Internet, the onus is still on the servicemember to update his or her mailing and email addresses with the state every time his or her deployment location changes. When an active duty voter is preparing for deployment, it is understandable that he or she may not think to send the Ohio Board of Elections his or her new contact information to ensure a ballot is mailed to the correct place. Regardless of the assistance the UOCAVA's provisions purport to provide, absent active duty voters are confronted with real barriers to exercising their political enfranchisement while serving their country.

D. Federal Law Meant to Assist Absent Servicemembers in Voting Cannot Overcome All of the Barriers Ohio's Supplemental Process Imposes on Military-Connected Student Voters.

Although some military-connected students receive absentee assistance to alleviate some of the

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[25] *See* 52 U.S.C. § 20303(b) (providing that ballots must be submitted in accordance with State rules); Ohio Rev. Code Ann. § 3511.021(4) (prohibiting the submission of ballots electronically).

burden on their right to vote, most of them, subject to the same concerns that prompted the UOCAVA, have their transient residency problems compounded because they are ineligible for the UOCAVA's voter assistance programs.

1. There is Currently a Significant Increase in the Number of Military-Connected Students Enrolling in Higher Education During or After Their Military Service.

Military-connected students are attending schools across the country as part of the largest influx of veteran college enrollment since post-World War II.[26] The U.S. Department of Defense reports that after the Post-9/11 GI Bill was enacted in 2009, military-connected student enrollment increased by 35,000 to over 500,000.[27] Estimates indicate that by 2012, military-connected student enrollment was up to 900,000.[28] The U.S. Department of Veterans Affairs ("VA") reports approximately 1.1 million veterans used educational benefits between 2000 and 2013.[29]

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[26] Sue Doe & Lisa Langstraat, *Generation Vet: Composition, Student Veterans, and the Post-9/11 University* 1–2 (2014).

[27] *Id.*

[28] *Id.*

[29] U.S. Dep't of Veterans Affairs, *Department of Veterans Affairs Education Program Beneficiaries: FY 2000 to FY 2013*, NAT'L CTR. FOR VETERANS ANALYSIS AND STATISTICS (2017), https://www.va.gov/vetdata/Utilization.asp.

In Ohio, approximately 27,000 student veterans relied on VA educational benefits from 2000 to 2013.[30]

Accounting for this influx of military-connected students, the legislative and executive branches have taken significant steps to provide these students with financial and other assistance. *See* 38 U.S.C. § 3313 (2017). For example, the GI Bill requires schools to charge in-state tuition and fees to eligible military-connected students residing in the state in which the school is located. 38 U.S.C. § 3313(c)(1)(A)(i). In August, Congress passed and the President signed into law the Harry W. Colmery Veterans Educational Assistance Act of 2017, which provided military-connected students with additional housing benefits contingent upon their education. Pub .L. No. 115-48, 131 Stat. 973 (Aug. 16, 2017). The recent enactment of a law implementing further protections for military-connected students' residency demonstrates that, despite the uncertainty surrounding student residency and voter access,[31] consensus exists across political parties and branches that military-connected students should be guaranteed a full range of GI Bill benefits.

Generally, the GI Bill ties its financial benefits to the residence of military-connected students during their enrollment. *See* 38 U.S.C. § 3318. Because many student veterans rely on the GI Bill's financial

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[30] *Id.*

[31] Controversy surrounding the policies regarding how military-connected students' changing residences should affect their access to or ability to vote began shortly after the flood of student veterans enrolled in college after World War II. *See, e.g., Dunn* at 345–49, *Robbins v. Chamberlain*, 297 75 NE. 2d 617 (1947).

assistance to afford tuition and living expenses, they should not be penalized for changing their residence to retain these benefits. Unfortunately, the military-connected students who move to their schools to attain the financial means to study risk losing the ability to vote in the state where they are already registered to vote.

2. Protections for Military-Connected Student Voters are Severely Inadequate to Overcome Barriers to Voting.

Servicemembers in the National Guard and Reserves, although still subject to deployments on short notice, are unfortunately not covered by the UOCAVA. *See* 52 U.S.C. § 20310. Most military-connected students, however, transfer to the National Guard or Reserves to pursue their education.[32] Therefore, these military-connected students are largely left with the same voter protection as the general collegiate student body.

Where non-military-connected students are "particularly mobile,"[33] military-connected students

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[32] *See* Dani Molina & Andrew Morse, *Military-Connected Undergraduates: Exploring Differences Between National Guard, Reserve, Active Duty, and Veterans in Higher Education*, THE AM. COUNCIL ON EDUC. 5 (Nov. 2015), http://www.acenet.edu/news-room/Documents/Military-Connected-Undergraduates.pdf.

[33] Yael Bromberg et al., *Tuning In & Turning Out: Millennials are active but not voting; what's stopping them and*

often endure an even more transient educational experience. Military-connected students are subject to deployment on short notice due to the nature of their active duty or reserve status.[34] Further, military-connected students confront the general challenge of transitioning from the military into civilian student life.[35]

Military-connected students, therefore, are faced with compounding barriers to voting: they are part of a young demographic already less likely to vote, they are balancing military service with a desire to succeed in school, and their residencies are in flux. Ohio's Supplemental Process imposes an additional and inappropriate barrier on military-connected student voters' ability to vote.

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how can we make their voices count?, COMMON CAUSE 8 (2016), http://www.commoncause.org/research-reports/tuning-in.pdf.

[34] *See* Corey B. Rumann & Florence A. Hamrick, *Student Veterans in Transition: Re-enrolling after War Zone Deployments*, 81, 4 J. OF HIGHER EDUC. 431 (July/Aug. 2010) https://muse.jhu.edu/article/388554/pdf (stating that National Guard and Reserve units "often face problems associated with mid-semester academic withdrawals.").

[35] *See infra* Section IV; *see also* Jon Marcus, *Community Colleges Rarely Graduate the Veterans They Recruit*, THE ATLANTIC (Apr. 21, 2017), https://www.theatlantic.com/education/archive/2017/04/why-is-the-student-veteran-graduation-rate-so-low/523779/.

III. Ohio's Supplemental Process Will Exacerbate the Difficulties Servicemembers Face in Voting.

Under the NVRA, Congress requires states to conduct a general program that makes a reasonable effort to remove the names of ineligible voters because of the registrant's death or change in residence. 52 U.S.C. § 20507(a)(4). The NVRA clearly specifies that a state's list-maintenance program "shall not result in the removal of the name of any person by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2), (c)(1). Ohio's voter roll maintenance program does just that.

The stated purpose of Ohio's Supplemental Process is to "identify electors whose *lack of voter activity* indicates they may have moved."[36] However, the Supplemental Process captures any lack of voter activity regardless of whether the voter has actually moved. This broad criterion for triggering Confirmation Notices disparately harms active duty servicemembers and veterans, who may miss an election because of a temporary deployment rather than a permanent out-of-state move.

Ohio has two procedures to remove voters whom it considers ineligible from its rolls.[37] First, the State relies on change-of-address notices filed with the United States Postal Service to alert it that notice must be sent so that the registrant may confirm the address change.[38] The second procedure, at issue here, is Ohio's Supplemental Process, through which

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[36] Ex. G to Defs. 1st. (emphasis added).

[37] Pet. App. 43a.

[38] *Id.* at 4a, 44a-45a.

the State sends Confirmation Notices to any registrants who have not voted for two years.[39] If a registrant does not respond to the Notice and fails to vote for an additional four years, the registrant is removed from Ohio's voter rolls.[40] As the Sixth Circuit found, the Supplemental Process would violate the NVRA because removal of the voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 710 (6th Cir. 2016) (quoting *Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 952 (9th Cir. 2002)). Not only does this process contravene the NVRA's clear prohibition that voters may not be removed for failure to vote, but it does so to the great disadvantage of current and former servicemembers whose unique circumstances already make it difficult for them to register and vote – even when they want to.

A. Prior to Their Removal from Voter Rolls Through the Supplemental Process, Servicemember Voters Face Significant Obstacles Which Ohio Must Mitigate, Not Aggravate.

Active duty servicemembers and veterans receive a Fleet Post Office ("FPO") or Army Post Office ("APO") mailing address[41] during their time in the service. Although mail sent to FPO/APO addresses

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[39] *Id.* at 5a, 46a.

[40] *Id.* at 5a, 57a.

[41] *Shipping via Military Mail [APO, FPO, DPO]*, GOVX (2016), https://support.govx.com/hc/en-us/articles/226407608-Shipping-via-Military-Mail-APO-FPO-DPO-.

remains accessible in many circumstances, servicemembers receive only mail sent directly to their FPO/APO addresses. Mail sent to a previous home address is not forwarded unless the servicemember has someone to regularly check and manually forward his or her mail. Servicemembers must constantly update FPO/APO addresses in order to continue receiving mail.[42]

Eighteen to twenty-four-year-olds and people without college degrees – the majority of military servicemembers – are already less likely to vote.[43] That demographics' disengagement is exacerbated by the unique challenges servicemembers face in casting ballots and receiving essential administrative notices.[44] Furthermore, these young enlistees may or may not have voted in previous elections, and may not know to provide their military addresses to the Board of Elections in order to receive election-related notices.[45] Servicemembers also may need to travel or move frequently and with short notice, further inhibiting consistent access to mail.[46]

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[42] U.S. Army, *Army Postal Services* (Oct. 2015).

[43] Bromberg et al., *supra* note 33, at 5.

[44] *Id.*

[45] *See* Andy Sullivan & Grant Smith, *Use it or lose it: Occasional Ohio voters may be shut out in November*, REUTERS (June 2, 2016), www.reuters.com/article/us-usa-votingrights-ohio-insight/use-it-or-lose-it-occasional-ohio-voters-may-be-shut-out-in-november-idUSKCN0YO19D; *see also* David Thackham, *DOJ wants to know how S.C. purges voters. Here's what the state will say*, THE HERALD (July 2015), http://www.islandpacket.com/news/politics-government/election/article161683808.html.

[46] Bromberg et al., *supra* note 19, at 9.

B. Existing Military Voter Support Cannot Mitigate Further Barriers Created by the Supplemental Process.

Each command has a designated voting representative whose duties include providing resources and helping servicemembers register to vote and cast ballots. However these representatives are officers who have separate primary duties. Voter aid as merely a collateral duty.[47] As such, the effectiveness of the voting representative may depend largely on individual officers' engagement with helping the servicemembers in his or her command vote.

Servicemember registration and voter participation have seen significant decreases in recent years despite the UOCAVA's assistance programs.[48] Active duty servicemembers – 71% of whom are ages eighteen to twenty-four – are routinely deployed, often on very short notice.[49] For those sent

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[47] *See, e.g.*, U.S. Navy, *Voting Assistance Officers*, Commander, Navy Installation Command (2017), https://www.cnic.navy.mil/ffr/fleet_readiness/special_interest_programs/navy_voting_assistance_program/voting-assistance-officers.html.

[48] *See supra* Section II.A.-II.B.; *see also* R. Michael Alvarez et al., *Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem*, 34 FORDHAM URB. L.J. 935, 966 (2007) ("As with previous military voting laws, some discretion is still left to the states under UOCAVA, and variations in registration requirements, deadlines for submitting ballots, and tight time frames between when ballots are sent to military voters and when they are due to be returned still cause problems.").

[49] *See* Bromberg et al., *supra* note 33, at 5.

to combat zones, there are understandably higher priorities than registering and voting, even when the desire is there to do so.[50] Ohio's Supplemental Process creates an additional hurdle. If an active duty servicemember deployed in a combat zone fails to register or vote for two years, he or she becomes subject to the Supplemental Process. Where he or she fails to respond to the Notice and does not vote for an additional four years because of the array of obstacles that active duty servicemembers face in reentering society, they are removed from Ohio's voter rolls. These burdens persist once active duty servicemembers leave the service and transition to veteran status.

IV. Like Active Duty Servicemembers and Military-Connected Students, Veterans are Vulnerable to Measures Hindering Their Ability to Vote.

Available transition assistance programs for outgoing servicemembers may involve certain required informational sessions on relocation assistance, transitional healthcare, job search resources, and financial coaching However, taking part in such programs is optional.[51] Unfortunately, many veterans suffering from service-related trauma remain untreated.[52]

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[50] *Id.*

[51] *Transition Assistance Program Overview*, MILITARY.COM (Sept. 2017) http://www.military.com/military-transition/transition-assistance-program-overview.html.

[52] *Study explores reasons why Veterans seek – or don't seek – PTSD care*, DEP'T OF VETERANS AFFAIRS (Apr. 24, 2014),

Veterans face several difficulties in transitioning to civilian life, including a high likelihood of experiencing post-traumatic stress disorder or homelessness, as well as high rates of disability[53] and substance abuse,[54] which can lead to criminal charges and disenfranchisement. Ten percent of people experiencing homelessness in the U.S. are veterans, and 75% of homeless veterans deal with mental health issues, substance abuse issues, or both.[55] Roughly 20% of veterans participating in substance abuse treatment are homeless.[56] According to 2014 U.S. Department of Housing and Urban Development data, 8.6% of Ohio's veterans are unemployed and roughly 1,183 are homeless.[57]

Veterans have an increased likelihood of experiencing homelessness and poverty based on their low rates of employment. In August 2015, only

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https://www.research.va.gov/currents/spring2014/spring2014-25.cfm.

[53] *What do we do with the staggering number of Disabled Veterans?*, NAT'L VETERANS FOUND. (Oct. 23, 2015), https://nvf.org/staggering-number-of-disabled-veterans/ (reporting that roughly 45% of veterans from Iraq and Afghanistan filed disability claims).

[54] *What Statistics Show About Veteran Substance Abuse and Why Proper Treatment is Important*, NAT'L VETERANS FOUND. (Mar. 30, 2016), https://nvf.org/veteran-substance-abuse-statistics/.

[55] *Critical Issues Facing Veterans and Military Families*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Jan. 20, 2017), https://www.samhsa.gov/veterans-military-families/critical-issues.

[56] *Id.*

[57] Housing Assistance Council, *Supporting Veterans in Ohio*, VETERANS DATA CENT (last visited Sept. 20, 2017), http://veteransdata.info/states/2390000/OHIO.pdf.

49% of veterans without a service-connected disability were employed, and only 43.3%, of veterans with a service-related disability were employed.[58] Low-income and homeless people consistently vote less than people in higher income brackets,[59] in part because of the many barriers that poverty and homelessness create for participation in the electoral process, including lack of identification or proof of address, limited ability to take time off from work to vote, or lack of access to transportation.[60] In 2014, Ohio drastically decreased its early voting hours, creating additional challenges for several demographics that frequently intersect with the veteran population. [61]

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[58] Bureau of Labor Statistics, *43.3 percent of veterans with a service-connected disability were employed in August 2015* (Nov. 10, 2016), https://www.bls.gov/opub/ted/2016/43-point-3-percent-of-veterans-with-a-service-connected-disability-were-employed-in-august-2015.htm.

[59] Sean McElwee, *The Income Gap at the Polls*, POLITICO (Jan. 7, 2015), http://www.politico.com/magazine/story/2015/01/income-gap-at-the-polls-113997.

[60] Daniel Weeks, *Why Are the Poor and Minorities Less Likely to Vote?*, THE ATLANTIC (Jan. 10, 2014), https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/.

[61] Ellen Brait, *Voting Restrictions in the U.S. Since the Election: State by State*, THE GUARDIAN (Jul. 13, 2015), https://www.theguardian.com/us-news/2015/jul/13/voting-restrictions-2010-election. (although a couple of early voting days were restored – that settlement also eliminated the "golden week" that allowed same-day registration) (internal quotations and citations omitted).

While states can no longer require a "traditional dwelling" for voter registration,[62] veterans experiencing homelessness still encounter difficulties, namely satisfying durational residency and proof of identity or address requirements.[63] While a homeless person can list a shelter or general residential vicinity on registration forms, that type of address makes it less likely that the Notices will reach the intended recipient.[64]

V. This Court Has Historically Intervened to Protect the Fundamental Right to Vote for Military Servicemembers.

In a particularly cruel irony, Ohio's Supplemental Process imposes greater burdens on the very people who dedicate their lives to defending American democracy by obstructing their participation in the democratic system.

This Court has a tradition of protecting military servicemembers' right to vote against state-

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[62] *Voter Rights/Registration Packet 2010*, NAT'L COAL. FOR THE HOMELESS 8 (2010), http://nationalhomeless.org/projects/vote/Manual_2010.pdf.

[63] *Id.*; Patrick Marion Bradley, *The Invisibles: The cruel Catch-22 of being poor with no ID*, WASH. POST (June 15, 2017), https://www.washingtonpost.com/lifestyle/magazine/what-happens-to-people-who-cant-prove-who-they-are/2017/06/14/fc0aaca2-4215-11e7-adba-394ee67a7582_story.html?utm_term=.c1cab0e27a41.

[64] Amy L. Freeman, *How Do You Register to Vote if You're Homeless?*, HUFFINGTON POST (Aug. 26, 2014), http://www.huffingtonpost.com/amy-l-freeman/voting-and-homeless_b_5533134.html.

imposed barriers. In a striking example of this Court's tendency – and obligation – to intervene on behalf of voters' rights, it struck down a state law excluding active duty servicemembers from voting in state and local elections in *Carrington v. Rash*, 380 U.S. 89 (1965). The Court found that such a classification violated the Equal Protection Clause, recognizing that "the uniform of our country . . . [must not] be the badge of disfranchisement for the man or woman who wears it." *Id.* at 97 (alteration in original). Just as the Court in *Carrington* recognized that servicemembers are a population subject to unjust disenfranchisement, so too should this Court intervene to uphold the rights of those servicemembers unfairly burdened by Ohio's Supplemental Process.

Recently, in *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247, 2257 (2013), the Court read the NVRA's requirement to "accept and use" the Federal Form for voter registration to bar states from requiring documentary proof of citizenship in addition to regular Federal Form submissions. The Court explained that if states were allowed to require such additional documentation, the Federal Form would "cease[] to perform any meaningful function, and would be a feeble means of 'increas[ing] the number of eligible citizens who register to vote in elections for Federal office,'" one of the statute's most important stated purposes. *Id.* at 2256 (second alteration in original) (quoting 52 U.S.C. § 20501(b)(1)). The Court protected vulnerable voters whom Arizona had disenfranchised by imposing an invalid interpretation of the NVRA and failing to heed the NVRA's purpose of allowing eligible voters to maintain their eligibility.

The Court should similarly intervene now to protect vulnerable voters from the additional barriers Ohio's Supplemental Process imposes on their ability to vote.

CONCLUSION

For the foregoing reasons, the Sixth Circuit's judgment that Ohio's Supplemental Process violates the NVRA's prohibition on removing registrants for lack of voter activity should be affirmed.

Respectfully submitted,

Deborah N. Archer
NEW YORK UNIVERSITY SCHOOL OF LAW
CIVIL RIGHTS CLINIC
245 Sullivan Street
New York, NY 10012
(212) 998-6528
Deborah.Archer@nyu.edu

Aderson B. Francois
Counsel of Record
INSTITUTE FOR PUBLIC REPRESENTATION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535
Abf48@law.georgetown.edu

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